



Improving welfare as the UK leaves the EU: how to end the live export of farm animals and horses while remaining competitive and compliant with WTO rules

Summary

The Government has said that they will maintain and, where possible, improve standards of animal welfare in the UK as we leave the EU^{1,2}. We feel that prohibiting the export of live animals for slaughter or fattening could best be achieved through a trade ban though other methods such as restricting journey times once the animals have left the UK are possible. Either measure may need to be defended at the WTO but that there is a clear framework established now under trade rules to ensure that such a measure can be crafted so that it can pass the tests set at the WTO and be permissible under trade rules.

Introduction

European rules on the live transport of animals date from 2005, and are implemented in the UK through the devolved administrations³. These rules set out the conditions for the transport of animals, including that they should not be transported so that they are caused injury or suffering, and provide specific limits on journey times for animals, on land and at sea and the authorisation process for transporters, vehicles and ships.

The allowed journey times vary according to different species. Whilst an eight hour journey is generally considered the maximum, it can be extended if the vehicle meets a number of additional requirements: maximum journey times before a 24 hour rest is required can thus vary from 19 hours for calves to 24 hours for horses and pigs, and even to 29 hours for sheep and cattle. Following the required rest period, the rule is reset and other journeys can be undertaken until the final destination is reached. Nevertheless, the public support further restrictions. During the Brexit Referendum campaign, banning live exports of animals resonated with the public⁴.

The total numbers of all farm animals exported from the UK to the continent for slaughter or further fattening has been slowly declining from 752,000 in 2000 to around 43,000⁵ in 2016. Almost all were sheep. In the same year around 23,000 cattle were exported from Northern Ireland to the Republic of Ireland, accounting for around 5% of the total beef production in Northern Ireland⁶. Over half these animals were Republic of Ireland cattle which had gone to Northern Ireland for further fattening and then returned for slaughter⁶. This highlights the complexity of the trade that will occur between the UK and EU once Brexit happens. Trade from the UK in calves has declined from 83,000 in 2006⁷ to around 6,000 in 2015⁸, almost all from Northern Ireland to Spain, as it has become more economic to keep and raise the calves in the UK and there were fears over the TB status of the animals exported⁷.

On the horse trade, the UK has a long history of imposing conditions on the exportation of horses, starting from Exportation of Horses Act 1914 which stated that horses could not be exported unless a veterinarian had certified that they were capable of being exported without cruelty, and of being worked without suffering. A ban was then placed on the export of any 'work-worn' horse, pony, ass or mule by introducing a 'minimum value' for export in the 1937 Exportation of Horses Act. The ban on exporting some ponies and

some horses under a minimum value remains in UK law (Animal Health Act 1981) but has not been enforced in recent years.

How does Brexit change the situation for live export of animals?

Once the UK leaves the EU it will no longer be constrained by EU rules that prevent Member States from implementing bans on free movement of goods and live animals within the Union. EU law prevents any restriction on imports and exports between Member States under Articles 34 and 35 of the Treaty on the Functioning of the EU. However, exemptions are allowed under Article 36 which mimics the exemptions contained in Article XX of the WTO-covered GATT agreement:

The provisions shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants;..... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The UK has had a de facto ban under the minimum values legislation on exporting live ponies and some horses for slaughter since 1937. While it remains in UK law only some elements of the legislation are now being actively enforced. Depending on what model the UK uses to leave the EU, any change to the live transport rules on exporting farm animals to the EU, including a ban, will have to be compatible with the WTO rules.

What are the welfare concerns regarding live export of farm animals to the EU?

Our concerns fall into three main areas:

1 The conditions used to transport the animals over long distances

The most recent summary of science of long distance transport showed that use of partitions in horse transport, compulsory fasting of pigs with provision of water at stops, and temperature limits for poultry were the major areas for improvement⁹. In particular it recommended that untrained horses should not be transported for longer than 12 hours⁹. Research has also shown problems faced by calves during long distance transport¹⁰.

2. Enforcement

There is concern that enforcement of existing live transport laws is lacking in many Member States. The European Commission's own report into live transport states that effective enforcement remains a major challenge⁹. In 2012 the Commission decided not to review or amend Council Regulation (EC) No 1/2005 but to focus on improving enforcement. However, how it will achieve this remains unclear.

3. Export to countries with lower animal welfare standards

There is ongoing concern that the animals are exported to countries where they face conditions that are illegal in this country. For instance the calves sent abroad in 2016 were mainly destined for Spain, where standards for housing calves are below those in the UK, in particular regarding the provision of bedding for the animals. A proportion of sheep exports are destined for France and many have been transported for the Eid al-Fitr and Eid Al-Adha festivals.

What are the options facing the UK to ban on live exports under the WTO?

The UK has two options. Firstly it could ban the live exports of farm animals for slaughter alone or additionally for further fattening. Secondly it could impose journey time limits on transport once the animals had left UK territory. Both are not possible until the UK leaves the EU. As the Calf Forum has shown, it is economic reasons that drive the trade and huge progress can be gained by improving the market conditions in the UK so the meat either stays in the UK or it exported in a carcase form⁷.

Would the UK be able to justify a ban on live exports under the WTO?

The WTO is the intergovernmental body that manages the global trade rules. Trade measures including bans are only discussed and evaluated by the WTO if a country is challenged by another WTO member. The UK has a number of trade bans (most of which are implemented at the EU level) which have never been challenged or tested. They can thus remain in place regardless of their potential compliance with WTO

rules. These include the 2007 import ban on fur produced from cats and dogs (implemented due to concerns on the killing methods used) and the import ban on cosmetics tested on animals, fully in place since 2013. All are part of UK law and will continue to have effect once the UK leaves the EU. The UK, under the Export of Horses Order (Veterinary Examination) 1966, also placed bans on horses and ponies being exported to the continent if they were less than a certain value; yet it crucially allowed the export and imports of all horses to and from Ireland. None of these have been challenged at the WTO.

If a ban on live exports of animals was challenged at the WTO, it would probably fall foul of Article XI which prohibits countries from imposing quantitative bans or restrictions on imports or exports. If the UK banned live exports from England to the continent but allowed them from Northern Ireland to the Republic of Ireland it would also probably contravene Article I which prohibits a country from treating countries differently on trade in the same product.

Each trade measure is different and therefore its compatibility with the WTO regime can only be assessed once a panel has met and agreed a decision. However some guidance can be obtained from the trade disputes examined by the WTO over the past 23 years. 20 trade bans or restrictions relevant to animal welfare have been assessed in the past; seven directly concerned animals. The overarching trend has been for the WTO to increasingly accept restrictions to trade when the dispute concerns non-trade related societal values such as animal welfare. So justifying any trade ban under the exemptions in Article XX is crucial.

Article XX states that:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health”.

There have been over 431 disputes involving the GATT agreement since 1991¹¹ which have provided a framework on the compatibility of trade bans under the WTO regime. At time of writing, the WTO case law indicates that trade bans are allowed to protect endangered species¹², to defend animal welfare including to ensure that animals are not killed inhumanely¹³ and that a ban can apply to exports coming from other countries⁶. It has also been established that a country can set its own level of standards to protect public morals (which have been deemed to cover issues related to animal welfare) and one import ban has been based on how the product is produced¹⁴. The defence of a trade ban to protect animal life or health can include all animals, yet while these issues are connected to more general welfare of the animal, this defence has not been tested yet for animal welfare⁹. However, the caselaw has also demonstrated that a country may not be able to introduce a trade restrictive measure if it gives an unfair trade advantage to its own products and that a country has to prove that there is a relationship between the import ban and the policy goal pursued¹². It is also clear that any measures put in place for disease prevention purposes would need an up to date risk assessment based on internationally agreed standards and could not be based on the precautionary principle¹⁸. It remains unclear if trade bans are allowed based on how a product is produced but future cases could look at the relationship between this and the test of how “similar” products are treated, particularly as consumer preferences are now included in this test¹⁹.

The crucial hurdles that the UK would have to meet to ensure its export ban was allowed under GATT rules are the two tests under Article XX, namely meeting the public morals or animal health exception and then passing the chapeau test.

The concept of 'public morals' has been used previously when addressing trade-related animal welfare issues, including in the unchallenged U.S. Dog and Cat Protection Act of 2000 which states in its preamble that "the trade of dog and cat fur products is ethically and aesthetically abhorrent to U.S. citizens" and in the EU Seal Regime where the text and legislative history of the measure established the existence of the EU public's concerns on seal welfare¹³. The UK would have to show that there is a long standing public concern on the issue, which could be justified by the long held opposition by the public to live exports on animal welfare grounds, which go back, for horses, to the 1920s²⁰ and, for other animals, to at least the 1950s²¹, culminating in the large scale protests of the mid-1990s. The public's opposition to live exports has led to a UK ban on live exports being considered twice by the Court of Justice of the EU^{22,23}; at the time of these cases, the name of the Court was still the European Court of Justice (ECJ). There seems thus to be adequate evidence to argue for a ban on live exports based on public morals. The UK would then have to justify the adopted measures by proving that they were "necessary" and proportionate.

The burden of proving that a measure is "necessary to protect public morals" resides with the responding party, although a complaining party must identify any alternative measures that, in its view, the responding party should have taken²⁴. Any measure will be weighed and balanced against a series of three factors: the relative importance of the interests or values furthered by the challenged measure; the contribution of the measure to the realization of the ends pursued by it; and the restrictive impact of the measure on international commerce.

The import ban would have to demonstrate that it could not achieve the same results through a less trade restrictive measure such as a labelling scheme or a maximum limit on overall journey times. The UK would need to be able to show that public opposition to live exports does not stem solely from concerns about the length of the journeys (although concerns about journey length are an important factor in UK public opposition to live exports). UK public opposition to live exports also arises from the poor level of compliance with, and enforcement of, EU legislation on welfare during transport in many EU Member States. Indeed the European Commission²⁵ and EFSA⁹ have already acknowledged that enforcement is poor. UK public opposition to live exports also arises from concerns that animals exported from the UK may be reared and/or slaughtered to lower standards than those that prevail in the UK as already discussed above. The problems referred to earlier arising from poor enforcement of Regulation 1/2005 on transport, poor slaughter practices in some Member States and housing standards that would be illegal in the UK would not be addressed by a limit on journey lengths if that limit still resulted in animals being exported for slaughter or fattening. Only a ban on live exports for slaughter or fattening would enable the UK to achieve its chosen level of protection which includes effective enforcement of the legislation on welfare during transport and higher legislative requirements regarding welfare during slaughter and the housing of calves, which benefit from standards higher in the UK than in the EU. This approach was also taken by the Appellate Body in EC – Seal Products¹³.

The challenging country would also have to show that any alternative they are suggesting is "reasonably available" and would achieve the UK's desired level of protection with respect to the objective pursued. A number of disputes have shown that in previous cases alternative measures do not meet this test and so the challenged measure has passed the necessity test^{13,15,26}.

Once a Panel is satisfied that a disputed measure is "necessary to protect public morals" the Panel considers whether it satisfies the requirements of the "chapeau" of Article XX, which are the introductory words of the Article that prohibit measures being applied in a way that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The role of the chapeau is to ensure that the exceptions invoked as of right under Article XX are not applied in a manner that would "frustrate or defeat the legal obligations of the holder of the right under the substantive rules"²⁷. The requirements of the chapeau assessed against three tests, namely:

- does the measure result in discrimination;

- is the discrimination arbitrary
- do the same conditions prevail in the two countries²⁵, including has there been prior negotiations between the countries²⁸.

These tests are all essentially to assess how flexible the measure is compared to its objective. A number of measures have passed the chapeau test^{19,29, 30}, others have been tweaked to ensure they fit with the WTO obligations³¹.

How should the UK construct a live export ban?

As the EU demonstrated when it implemented the seal import ban in 2009³¹, constructing the measure well is crucial if it is to pass the WTO tests. There are a number of issues the UK should consider when it is drawing up the ban and here are our top ten:

1. Demonstrating the thread in the law between the measure and public concern³²
2. Conducting scientific overviews or other justifications for the measure³³
3. Showing clear purpose of the measure³⁴
4. Showing the measure is not a disguised restriction on trade³⁵
5. Constructing the measure to be flexible and not giving an advantage to domestic production
6. Conducting negotiations with other affected states prior to the measure coming in place²⁸
7. Ensuring it fits with international trade standards and justifying where it does not
8. Justifying why it is extra-territorial in its nature (or why extra-territorial impact)
9. Showing the measure is necessary by defining its contribution compared to the values being pursued; comparing its goal to what alternatives would achieve and how available they are; reducing its restrictiveness where possible; and showing the nexus between the measure and the goal to be achieved
10. Showing the measure is not arbitrary by comparing standards in the UK with those in other countries

[1] Michael Gove The unfrozen moment – delivering a Green Brexit. 21.7.17

<https://www.gov.uk/government/speeches/the-unfrozen-moment-delivering-a-green-brexite>

[2] Prime Minister, PMQs 8.2.17 Hansard

[3] [Welfare of Animals \(Transport\) \(England\) Order 2006](#), Welfare of Animals (Transport) (Scotland) Regulations 2006, Welfare of Farmed Animals (Transport) (Wales) Order 2007, Welfare of Animals (Transport) Regulations (Northern Ireland) 2006

[4] <http://www.telegraph.co.uk/news/2016/08/29/brexit-is-chance-to-halt-shameful-live-animal-exports-say-protese/>

[5] APHA 2017

[6] The Andersons Centre/Oxford Economics. 2017. Impact of WTO trading on the Northern Ireland beef and sheep meat industry.

[7] RSPCA/CIWF. 2013 The modern solution to the exports of calves: working in black and white. Beyond Calf exports stakeholder forum

[8] AHDB 2015

[9] EFSA 2011. Scientific Opinion concerning the welfare of animals during transport. EFSA Journal 2011; 9(1):1966

[10] Knowles, T.G. (1995) A review of post transport mortality among younger calves. Veterinary Record, 137, 406-407.

[11] https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm

[12] United States – Import Prohibition of Certain Shrimp and Shrimp Products 1998. WT/DS58/AB/R A

[13] *EU Measures prohibiting the importation and marketing of seal products* 2013 WT/DS400/AB/R

[14] United States – Import Prohibition of Certain Shrimp and Shrimp Products 1998 WT/DS58/AB/RW

[15] *China Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products* 2009 WT/DS363/R

[16] *EU Measures Affecting Asbestos and Asbestos-Containing Products* 2000 WT/DS135/R

[17] United States – tuna dolphin 2015 WT/DS381/R

[18] EU. *Measures affecting meat and meat products (hormones)* 1998. WT/DS26/AB/R

[19] United States Clove cigarettes. 2012 DS406/AB/R

[20] <http://www.worldhorsetwelfare.org/Our-History>

[21] RSPCA. 1974. 150 years of the RSPCA

[22] European Court of Justice Case C-5/94. The Queen v MAFF ex parte Hedley Lomas [1996] ECR I-2553 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0005&from=EN>

[23] European Court of Justice Case C-1/96. The Queen v MAFF ex parte Compassion in World Farming <http://curia.europa.eu/juris/showPdf.jsf?docid=43489&doclang=EN>

[24] Ibid Note 5 Report of the Appellate Body in EC- Seal Products, paragraph 5.169

[25] Report from the Commission to the European Parliament and the Council on the impact of Council Regulation (EC) No 1/2005 on the protection of animals during transport. 10.11.2011 COM(2011) 700 final

https://ec.europa.eu/food/sites/food/files/animals/docs/aw_practice_trans_10112011_report_en.pdf

[26] Brazil Measures affecting imports of retreaded tyres WT/DS332/AB/R 2007

- [27] United States - Standards for the Reformulated and Conventional Gasoline, WT/DS2/AB/R (20 May 1996), para 121.
- [28] United States - import prohibition of certain shrimp and shrimp products. (Article 21.5 – Malaysia) WT/DS58/AB/RW 2001
- [29] United States. Tuna dolphin. WT/DS381/AB/RW 2015
- [30] EU Measures Affecting Asbestos and Asbestos-Containing Products WT/DS135/R 2001
- [31] Regulation 1007/2009 on trade in seal products <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:cx0001>
- [32] Regulation 1007/2009 Preambular para no. 5
- [33] Regulation 1007/2009 Preambular para no. 11
- [34] Regulation 1007/2009 Preambular para no. 21
- [35] Regulation 1007/2009 Preambular para no. 13